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No. _____

In The

## Supreme Court of the United States

October Term, 1992

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LeROY MALDONADO, Personal Representative of the Estate of MARK P. MALDONADO, Deceased,

*Petitioner,*

vs.

ANN JOSEY, Personal Representative of the Estate of Margaret Berry,

*Respondent.*

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Does the *Estelle, Youngberg* and *DeShaney* "special relationship" affirmative duty of care apply to public school students?

II. If so, what is the scope of duty owed?

III. As of March 6, 1987, and presently, is there clearly established substantive due process protection from deliberate indifference to reasonably safe conditions of care while in the functional custody of state officials?

IV. Did the Court of Appeals for the Tenth Circuit err in requiring strict factual correspondence between the general legal principle or "establishing cases" and the fact pattern of the presenting case?

V. To what extent are conflicts of decisions within the same circuit, between circuits, and "unpublished" decisions determinative in the qualified immunity inquiry?

VI. Should knowledge of the general legal principle and the method of application to the facts be imputed to state officials via their "reasonably competent" legal advisors?

VII. If a circuit court of appeals proceeds to the underlying legal issue in a qualified immunity case, and renders a decision on the merits, then in the same opinion disposes of the case on qualified immunity grounds, holding that the party is "therefore entitled to qualified immunity," has the underlying substantive issue been decided, or is that issue permanently shrouded in a state of "unclear law" as in most qualified immunity decisions?

## PARTIES

The parties to the Tenth Circuit appeal are the same as those listed on the caption to this petition for writ of certiorari. However, because the Court of Appeals for the Tenth Circuit has listed all three defendants originally named in U.S. district court in the full caption of the reported Tenth Circuit decision, and there is some discussion of these parties vis a vis supervisory, "failure to train" liability in the Tenth Circuit opinion, their names are set forth herein: Butch McGowen, and Paul Malano.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 3

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE WRIT ..... 6

I. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT'S DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT AND U.S. DISTRICT COURT DECISIONS FROM OTHER CIRCUITS ON THE SAME MATTER, NAMELY WHETHER *ESTELLE, YOUNGBERG* AND *DESHANEY* SPECIAL RELATIONSHIP CUSTODIAL DUTY PROTECTION EXTENDS TO PUBLIC SCHOOL CHILDREN WHILE THEY ARE AT SCHOOL UNDER SUPERVISION AND CONTROL OF PUBLIC SCHOOL OFFICIALS PURSUANT TO COMPULSORY EDUCATION LAWS ..... 6

II. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, NAMELY WHETHER CHILDREN WHO ARE REQUIRED TO ATTEND SCHOOL AND THEREBY ORDERED INTO TEMPORARY DAYTIME CUSTODY OF STATE OFFICIALS BY COMPULSORY EDUCATION LAWS ARE CONSTITUTIONALLY ENTITLED

TABLE OF CONTENTS – Continued

Page

TO SOME LEVEL OF PROTECTION FROM HARM AND TO CARE FOR BASIC SAFETY DURING SCHOOL HOURS, AND TO WHAT EXTENT ..... 11

III. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION, APPLICATION OF THE *HARLOW* QUALIFIED IMMUNITY DOCTRINE, IN A WAY WHICH CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER, AND IN A WAY WHICH CONFLICTS WITH THIS COURT'S DECISIONS IN *HARLOW* AND *ANDERSON* ..... 16

CONCLUSION ..... 20

APPENDIX A – *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) ..... A1

APPENDIX B – *Maldonado v. Josey*, Tenth Circuit Judgment ..... B1

APPENDIX C – U.S. District Court Summary Judgment Opinion and Order ..... C1

APPENDIX D – Application and Order regarding Extension of Time to File Petition for Writ of Certiorari to and including December 24, 1992 ..... D1

APPENDIX E – Excerpts from Petitioner's Tenth Circuit Brief of Appellant ..... E1

APPENDIX F – New Mexico Compulsory School Attendance Law ..... F1

# TABLE OF AUTHORITIES

Page

CASES:

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 17

*Arroyo v. Pla*, 748 F.Supp. 56 (D.Puerto Rico 1990) . .8, 16

*Bell v. City of Milwaukee*, 746 F.2d 2305 (7th Cir. 1984) ..... 19

*Bell v. Wolfish*, 441 U.S. 520 (1979) ..... 11

*Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) ..... 15

*Bonacci v. King*, No. 91-3849, "unpublished" Court of Appeals for the Eighth Circuit decision (May 15, 1992) ..... 10

*Calkins v. Cox Estates*, 100 N.M. 59, 792 P.2d 36 (1990) ..... 15

*City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) ..... 7

*D.R. By L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992) (en banc), *cert. pending*, U.S. Sup. Ct. No. 92-816 ..... 9, 12, 13, 16

*DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989) ..... *passim*

*Doe v. Douglas School Dist. Re-1*, 770 F.Supp. 591 (D.Colo. 1991) ..... 10

*Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. pending*, U.S. Sup. Ct. No. 92-908 ..... 6, 7, 16

*Doe "A" v. Special Sch. Dist. of St. Louis*, 637 F.Supp. 1138 (E.D.Mo. 1986) .....8, 20

*Dorothy F. v. Little Rock School Dist.*, 794 F.Supp. 1405 (E.D.Ark. 1992) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Estelle v. Gamble*, 429 U.S. 97 (1976) ..... 6, 12, 14

*Garcia By Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988) ..... 16, 18

*Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978) .... 12

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... 17

*Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) ... 6, 7

*Ingraham v. Wright*, 430 U.S. 651 (1977) ..... 13, 14, 19

*J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990) ..... 10, 13

*Lopez v. Houston Independent School Dist.*, 817 F.2d 351 (5th Cir. 1987) ..... 6, 7, 16

*Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. pending*, U.S. Sup. Ct. No. ___ ..... *passim*

*Ney v. Hargrave*, No. 91-1831A, "unpublished" decision from the U.S. District Court for the Eastern District of Virginia, Alexandria Division (April 10, 1992) ..... 10

*Pagano By Pagano v. Massepequa Public Schools*, 714 F.Supp. 641 (E.D.N.Y. 1989) ..... 8

*Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) ..... 15

*Russell By Russell v. Fannin County School Dist.*, 784 F.Supp. 1576 (N.D.Ga. 1992) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3rd Cir. 1989) ..... 17, 18

*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ..... 19

*Waechter v. School District No. 14-030*, 773 F.Supp. 1005 (W.D.Mich. 1991) ..... 9

*Youngberg v. Romero*, 457 U.S. 307 (1982) ..... *passim*

CONSTITUTIONAL PROVISION:

Fourteenth Amendment, Section 1 ..... 3

STATUTES:

Title 28 U.S.C. Section 1254(1) ..... 2

Title 28 U.S.C. Section 1331 ..... 4

Title 28 U.S.C. Section 1343 ..... 4

Title 42 U.S.C. Section 1983 ..... *passim*

Section 22-12-2 1978 N.M.S.A., as amended ..... *passim*

MISCELLANEOUS:

Comment, *Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983*, 132 U.Pa.L.Rev. 901, 923-32 (1984) ..... 18

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner LeRoy Maldonado, Personal Representative of the Estate of Mark P. Maldonado, Deceased, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals for the Tenth Circuit entered in the above entitled proceeding September 16, 1992.

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## OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit is reported in 975 F.2d 727 (10th Cir. 1992), reprinted in the APPENDIX hereto, A1-A21; the Tenth Circuit Judgment, also filed September 16, 1992, is reprinted in the APPENDIX hereto, B1-B2.

The U.S. District Court, District of New Mexico, Summary Judgment Opinion and Order, filed July 8, 1991, has not been reported. It is reprinted in the APPENDIX hereto, C1-C3.

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## JURISDICTION

The dates of entries of the Opinion and Judgment of the Tenth Circuit Court of Appeals sought to be reviewed herein are September 16, 1992. (A1-A21 and B1-B2)

Application of No. A-423 for extension of time to file Petition for a Writ of Certiorari was filed in this Court on November 27, 1992, and ruled upon by Justice Byron R. White November 30, 1992, Order granting extension of time within which to file this Petition for Writ of Certiorari to and including December 24, 1992. *See* APPENDIX hereto, D1-D3.

The statutory provision conferring jurisdiction on the Court to review the decision in question by writ of certiorari is 28 U.S.C. Section 1254(1).

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Title 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New Mexico Compulsory School Attendance Law, Section 22-12-2 1978 N.M.S.A., as amended, *see* APPENDIX F, *infra*.

## STATEMENT OF THE CASE

On March 16, 1987, Mark Maldonado, while attending Kearney Elementary School, a public grade school in Raton, New Mexico, pursuant to state compulsory education law, while unsupervised during class for nearly half of the period (twenty minutes), became caught on his bandanna in the cloakroom adjacent to his classroom and died of strangulation. Margaret Berry, now deceased, was the classroom teacher responsible for supervision of the fifth grade class.

On August 7, 1990, LeRoy Maldonado, natural father of the deceased Mark Maldonado, as Personal Representative of the Estate of Mark P. Maldonado, Deceased, filed the First Amended Complaint to Recover Damages for Wrongful Death, Violation of Civil Rights in U.S. District Court, District of New Mexico, pursuant to district court order permitting the filing of same. Monetary damages were requested under Title 42 U.S.C. Section 1983 for violation of the decedent's Fourteenth Amendment substantive due process rights, wrongful death resulting from alleged "deliberate indifference" to supervision, failure of the classroom teacher to monitor the whereabouts of said fifth grade students.

Jurisdiction of the district court was predicated on Title 28 U.S.C. Sections 1331 and 1343.

The district court granted summary judgment on July 8, 1991, holding:

> This Court cannot find the law well established as to the supervisory duty of a teacher in a classroom. At the time of Mark Maldonado's death, the law was not clearly established that

> grossly negligent, reckless or grossly reckless failure to supervise a public school student may give rise to a Section 1983 Fourteenth Amendment substantive due process violation. Margaret Berry, deceased, is therefore entitled to qualified immunity.

APPENDIX, C2.

Appeal was timely taken to the Tenth Circuit Court of Appeals on the issues of qualified immunity and the deceased's substantive due process rights to life and liberty. APPENDIX, E1-E2.

The Court of Appeals for the Tenth Circuit rendered its decision on September 16, 1992, APPENDIX, A1-A21 and B1, affirming the district court, as follows:

> [W]e conclude that compulsory attendance laws do not impose the severe restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment. . . . Therefore, appellee is entitled to qualified immunity.

APPENDIX, A15.

## REASONS FOR GRANTING THE WRIT

### I. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT'S DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT AND U.S. DISTRICT COURT DECISIONS FROM OTHER CIRCUITS ON THE SAME MATTER, NAMELY WHETHER *ESTELLE, YOUNGBERG* AND *DESHANEY* SPECIAL RELATIONSHIP CUSTODIAL DUTY PROTECTION EXTENDS TO PUBLIC SCHOOL CHILDREN WHILE THEY ARE AT SCHOOL UNDER SUPERVISION AND CONTROL OF PUBLIC SCHOOL OFFICIALS PURSUANT TO COMPULSORY EDUCATION LAWS.

The following Fifth Circuit decisions are in direct conflict with the Tenth Circuit's decision in *Maldonado v. Josey,* 975 F.2d 727 (10th Cir. 1992), APPENDIX, A1-A21. These cases hold that the *Estelle, Youngberg* and *DeShaney, infra,* "special relationship" affirmative duty of care applies to public school children.

1. *Doe v. Taylor Independent School Dist.,* 975 F.2d 137 (5th Cir. 1992), *cert. pending,* U.S. Sup. Ct. No. 92-908;

2. *Lopez v. Houston Independent School Dist.,* 817 F.2d 351 (5th Cir. 1987); and

3. *Horton v. Goose Creek Ind. School Dist.,* 690 F.2d 470 (5th Cir. 1982), *cert. denied,* 463 U.S. 1207 (1983).

*Taylor* raised the question of whether public "school officials" have a constitutional duty to protect students from sexual molestation by a teacher when there is reasonable notice to suspect such abuse. The Court of

Appeals for the Fifth Circuit answered affirmatively, analyzing the case under *two alternative standards, City of Canton, Ohio v. Harris,* 489 U.S. 378 (1989) supervisory "failure to train" liability *and* the *DeShaney* "special relationship" affirmative duty of care, finding liability, *independently,* under both theories. (Insofar as the holding is dependent upon knowledge of the specific risk, "known or reasonably foreseeable risks," 975 F.2d at 144, *Taylor* conflicts with *DeShaney v. Winnegabo Cty. Soc. Servs. Dept.,* 489 U.S. 189, 200 (1989), where this Court held that the "affirmative duty to protect arises not from the State's knowledge of the individual's predicament.") The *Canton* theory would only be available as against the entity and supervisory personnel. The *DeShaney* rule, however, would pertain to any "school official," including classroom teachers. (The *Taylor* court did not specifically address *DeShaney* liability of the teacher (sexual molester)). *Taylor,* cites two "primary liability" cases, *Horton* and *Lopez, supra,* for the proposition that "school officials can be held liable under §1983 for the harms suffered by school children based on a breach of their duty to protect school children," 975 F.2d at 145. "[T]he state cultivates a special relationship with that child and thus owes . . . an affirmative duty of protection. * * * [W]e . . . find a school child to be in the *'functional custody'* of school officials. . . . Separated from his or her parents (guardian), the child's safety and well-being are entrusted to school officials." (Emph. Supp.) *Taylor,* 975 F.2d at 145.

In *Horton,* a Fourth Amendment school case, the Fifth Circuit held that "school officials have both a right and a duty to provide a safe environment conducive to education," 690 F.2d at 480; and in *Lopez,* 817 F.2d at 356, the

Fifth Circuit held that a school bus driver was "entrusted with the care of students attending school under Texas' compulsory education statute . . . [and that h]is alleged failure to protect . . . or to render emergency care [when a student was beaten by other students on the bus] abuses state power, and supports a Section 1983 action if the jury finds it rose to the level of callous and indifference and was the cause of injury."

Reported U.S. District Court decisions applying *DeShaney* "custodial duty" protection to public school children are: *Doe "A" v. Special Sch. Dist. of St. Louis,* 637 F.Supp. 1138 (E.D.Mo. 1986) (where a Section 1983 liberty interest claim was stated against a school bus driver who sexually molested a handicapped student, "this Court does not doubt that the constitutional rights of children to be free from harm is commensurate with the rights of adults in state custody," *id.* at 1145); *Arroyo v. Pla,* 748 F.Supp. 56 (D.Puerto Rico 1990) (shooting of one student by another, where the court found that *DeShaney* applies within the public school context, but then incorrectly applied *DeShaney* by requiring that the harm be committed literally at the hands of the teacher, this in spite of the general "special relationship" custodial duty responsibility under *DeShaney,* 489 U.S. at 200, students were bringing guns to school and it was alleged that no reasonable affirmative action was taken to periodically check for firearms); *Pagano By Pagono v. Massepequa Public Schools,* 714 F.Supp. 641 (E.D.N.Y. 1989) (where failing to stop repeated abuse by students upon another student rose to the level of abuse of official responsibility and "deliberate indifference" triggering Section 1983 liability, the court found that the Section 1983 cause was analogous to

claims by prison inmates, *i.e.*, "[g]overnment owes a duty to protect a person from harm if there exists a 'special relationship' between that person and the government," *id.* at 643. "*We consider elementary school students who are required to attend school, the truancy laws still being in effect, to be owed some [Constitutional] duty of care by defendants . . .*," emph. supp., *id.*); *Waechter v. School District No. 14-030,* 773 F.Supp. 1005 (W.D.Mich. 1991) (A fifth grade handicapped boy was forced to run the punishment two minute 350 yard "gut run" at school, contrary to medical restriction of no forced exertion due to congenital heart defect. The student collapsed and died attempting to follow the teacher's command. The *DeShaney* "custodial duty" rationale for establishing a Fourteenth Amendment liberty interest violation was argued, *inter alia,* to the court upon defendants' motion to dismiss. The court denied the motion and applied *DeShaney* as follows: "*DeShaney* is explicit that the protections of the due process clause are triggered when the state's affirmative action 'restrains the individual's freedom to act on his own behalf.' *DeShaney,* 489 U.S. at 200. . . . Applying this reading of *DeShaney* as a general rule in substantive due process analysis, it is clear that decedent was in a *custodial relationship* with defendant . . . [, who] was his teacher . . . [,] aware of decedent's physical limitations [,] and as recess monitor . . . *undertook to supervise decedent's activities.* [The teacher's] affirmative action led to decedent's death," emph. supp., *id.* at 1009).

The following cases, going in the opposite direction along with *Maldonado,* illustrate the seriousness of the divergence on this issue in our federal courts: *D.R. By*

*L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992) (*en banc*), *cert. pending*, U.S.Sup.Ct. No. 92-816 (because children are free to leave school no *DeShaney* constitutional duty of care is owed); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990) (school children are not like prisoners or mental patients, therefore *DeShaney* does not apply); *Doe v. Douglas School Dist. Re-1*, 770 F.Supp. 591 (D.Colo. 1991) (schools have not rendered students helpless, therefore no *DeShaney* custodial duty of care is owed); *Bonacci v. King*, No. 91-3849, "unpublished" Court of Appeals for the Eighth Circuit decision (May 15, 1992) (the "State custody") requirement is not met by compulsory school attendance); *Ney v. Hargrave*, No. 91-1831A, "unpublished" decision from the U.S. District Court for the Eastern District of Virginia, Alexandria Division (April 10, 1992) (because of alleged delay and deliberate indifference in not calling "911," a student died of severe allergic and asthma attack; the district court held that there was no constitutional duty of care involved; in the opinion the judge conceded that the girl was "helpless"); *Russell By Russell v. Fannin County School Dist.*, 784 F.Supp. 1576 (N.D. Ga. 1992) (compulsory attendance in school did not impose upon the state any affirmative duty to protect); and *Dorothy F. v. Little Rock School Dist.*, 794 F.Supp. 1405 (E.D.Ark. 1992) (no constitutional duty to protect a handicapped student from sexual molestation by another student; no custodial relationship existed between the attacked student and the state sufficient to impose on the state an affirmative constitutional duty to protect him, and "[e]ven if the [c]ourt were to conclude that a constitutional duty to protect exists based on the

alleged facts, the defendants would likely prevail by virtue of qualified immunity," *id.* at 1422).

## II. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, NAMELY, WHETHER CHILDREN WHO ARE REQUIRED TO ATTEND SCHOOL AND THEREBY ORDERED INTO TEMPORARY DAYTIME CUSTODY OF STATE OFFICIALS BY COMPULSORY EDUCATION LAWS ARE CONSTITUTIONALLY ENTITLED TO SOME LEVEL OF PROTECTION FROM HARM AND TO CARE FOR BASIC SAFETY DURING SCHOOL HOURS, AND TO WHAT EXTENT.

The *DeShaney* substantive due process duty to provide a "reasonably safe" place for persons who are in a custodial relationship with the state, through "institutionalism, or other similar restraint," 489 U.S. at 200, was clearly established by *Youngberg v. Romero*, 457 U.S. 307 (1982) (involving fact pattern of a mentally retarded child involuntarily committed to "Penhurst State *School* and Hospital," emph. supp.), where this Court found that the liberty interest was implicated, and a section 1983 cause of action stated, by alleged failure to provide reasonably safe conditions of confinement, referring to *Bell v. Wolfish*, 441 U.S. 520 (1979) "detainees" who were entitled to such protection. "The State . . . has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. . . . Respondent thus enjoys constitutionally protected interests of reasonable care and safety." *Youngberg*, 457 U.S. at 324. *Youngberg* does not

turn on a voluntary versus involuntary distinction. (The Eighth Circuit specifically does not require "involuntary" confinement in a mental hospital for purposes of *Estelle v. Gamble*, 429 U.S. 97 (1976) protection, *see Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978).)

To focus on any degree of voluntary submission to public school, vis a vis the "choice" of attending a private school, or the "non-residency" of public school students in their schools overnight, as do cases holding that the "special relationship" constitutional duty does not exist within the school context, is to miss the point of *Estelle*, *Youngberg*, and *DeShaney*. State actors who *undertake* the care and "functional custody" of individuals have a corresponding duty to provide a reasonably safe environment. The case for *DeShaney* "custodial duty" application is only bolstered by *compulsory* attendance or confinement (including temporarily restrained or detained persons).

The concurring ("dissenting") opinion of Seymour, C.J., in *Maldonado*, points out part of the irony in this area of the law: "Under . . . [*D.R.'s*] analysis, school children, as *residents* in their parents' homes, are not in custody of the state. Therefore, parents retain responsibility for providing for the children's basic needs, including protection *during school hours*," emph. supp., 975 F.2d at 734, APPENDIX, A18. "The Third Circuit further stated that to provide this protection, parents may remove their children from public school in favor of home education or private schools . . . [, moreover] the student 'could . . . leave the school building . . . ," *id.*, A18-A19.

How many parents have the time, let alone the skill, to home-educate their children, if that is even an option in the state? In a great number of families both parents must work. What about single parent families? How many parents in this country have the resources to pay for private education? "For the vast majority of children of school age, [there] is no choice at all." *D.R.*, 972 F.2d at 1380 (Sloviter, C.J., dissenting). Decisions such as *Maldonado, D.R.* and *Alton, supra,* not only are impractical, they have not been decided within the context of the real world. This unfair and illogical state of the law cries out for a "reality check" by the highest Court of our land.

"Younger children are incapable of providing for their own basic needs [, as if this even has to be said]; they depend on . . . [their] caretakers [, including daytime caretakers,] to provide for them. Even the Third Circuit recognized the difference between younger and older school children. . . . [T]he court in *Middle Bucks* stated: *'[e]xcept perhaps when very young,* the child is not physically restrained from leaving school during school hours.' *Id.* at 1372 (quoting *Ingraham v. Wright,* 430 U.S. 651, 670 . . . [(1977)] (emphasis supplied)." *Maldonado,* 975 F.2d at 735 & n.2, APPENDIX, A19 (Seymour, C.J., concurring, "dissenting" opinion). Nevertheless, *D.R.* went on to sweep grade school children in with high school students.

"Even older children may be forced by school disciplinary procedures and rules [, including closed campus restraint,] to rely on *authority figures* at school to protect them from harm. *I cannot fathom who, other than a teacher or other school staff member, is capable of ensuring the 'reasonable safety' of schoolchildren during the school day and class*

*periods,"* emph. supp., *Maldonado,* 975 F.2d at 735, APPENDIX, A19-A20, concurring, "dissenting" opinion.

Although such restraint and control as corporal punishment has been constitutionally sanctioned in *Ingraham, supra,* there is no concomitant constitutional substantive due process duty, according to the *"Maldonado"* line of cases, to provide a "reasonably safe" school environment, this in spite of the Court's teaching in *Ingraham,* 430 U.S. at 672, that the liberty interest may be implicated vis a vis bodily integrity within the public schools. (In the context of *procedural* due process, *Ingraham* held that traditional common law remedies are fully adequate to afford procedural due process. The *Maldonado* court ignored procedural due process argument. There is no state remedy against an educator in New Mexico. *Maldonado,* 975 F.2d at 735 n. 4., APPENDIX, A21, concurring, "dissenting" opinion.)

Although Judge Seymour disagrees in *Maldonado* with the majority's refusal to apply *Estelle, Youngberg,* and *DeShaney* custodial protection in public schools, she concurred in the holding, because, applying *DeShaney* protection, the way that Mark Maldonado died in the cloakroom (unsupervised for half of the class period, becoming entangled and strangling to death) was not a "foreseeable risk," thus the classroom teacher was not "deliverately indifferent," thus no Section 1983 claim was stated. *Maldonado,* 975 F.2d at 735, APPENDIX, A16 & A20. In this regard, Judge Seymour's concurring opinion also conflicts with *DeShaney,* 489 U.S. at 200, where this Court held that "[t]he affirmative duty to protect arises *not from the State's knowledge of the individual's predicament. . . . "* (Emph. Supp.)

*Maldonado* presents this Court with an examination of the scope of *DeShaney* protection, within the public schools, which is critically in need of definition given the disparate and ever-increasing school cases stemming from the violence in our society, as it found more and more often within the schools. To what extent would the *DeShaney* constitutional duty of care be owed when the harm is inflicted by one student upon another, *e.g., Pla, supra,* where firearms were brought onto school grounds?

*Maldonado* is a *"Palsgraf"* test for the Court to evaluate the limits of the *DeShaney* language that a specific predicament need not be known by the state actor. How does this fit with the Section 1983 threshold of "deliberate indifference," *Berry v. City of Muskogee,* 900 F.2d 1489, 1494 n.5, 1495 (10th Cir. 1990), defined in *Berry,* 900 F.2d 1495-96 & n.9, in terms of negligence "foreseeability" and "known or obvious risk". *See also Calkins v. Cox Estates,* 100 N.M. 59, 62, 792 P.2d 36, 39 (1990): "In determining duty, it must be determined that the injured party was a foreseeable plaintiff – that he was within the zone of danger created by the respondent's actions. * * * A duty to an individual is closely intertwined with the foreseeability of injury to *that individual,* resulting from an activity conducted with less than reasonable care by the alleged tort-feasor. * * * *Palsgraf v. Long Island R.R.,* 248 N.Y. 139, 162 N.E. 99 (1928)."

In *Maldonado,* although the specific "predicament" was not known, Mark Maldonado was within the "zone of danger" – the classroom teacher had a duty not to be "deliberately indifferent" to the supervision of her fifth grade class, of which Mark Maldonado was a member,

particularly as to knowing the whereabouts of the students for half of the class period, knowing at least constructively that one key reason for supervision of grade school-aged students is to prevent physical harm and accidents.

Another related issue for Supreme Court decision in this case is whether "inaction" may suffice to state a *DeShaney* public school case, as in *Lopez, supra,* or whether the harm must result from infliction by the school official, as in *Pla, supra.*

## III. THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION, APPLICATION OF THE *HARLOW* QUALIFIED IMMUNITY DOCTRINE, IN A WAY WHICH CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER, AND IN A WAY WHICH CONFLICTS WITH THIS COURT'S DECISIONS IN *HARLOW* AND *ANDERSON.*

The *Maldonado, D.R.* and *Taylor* Petitions for Writs of Certiorari, all currently pending before this Court, arrive in qualified immunity wrappers. This seems to be the "state of the art" in constitutional tort appellate practice, where the underlying constitutional "right" cannot be clearly established and the issue is preserved, in perpetuity, where "there looms the . . . unpalatable possibility of multiple bites of a constitutionally forbidden fruit." *Garcia By Garcia v. Miera,* 817 F.2d 650, 656 n.8 (10th Cir. 1987), *cert. denied,* 108 S.Ct. 1220 (1988).

The qualified immunity holding in *Maldonado* is an enigma. The Court of Appeals for the Tenth Circuit

"conclude[d] that compulsory attendance laws do not impose the severe restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment," 975 F.2d at 733, APPENDIX, A15, yet later, on the same concluding page of the majority opinion, Circuit Judge Tacha finds: "Therefore, appellee is entitled to qualified immunity." The court was aware of conflicting decisions which factored into the qualified immunity holding. Is the first conclusion pertaining to application of *DeShaney* to public schools of precedential value on the merits, or is *Maldonado* merely precedent that qualified immunity may successfully be invoked by educators in the Tenth Circuit whenever a *DeShaney* type claim is advanced for alleged "deliverate indifference" to a public school child's safety – because the law is not "clearly established"?

Both the Court of Appeals for the Tenth Circuit and the U.S. District Court, District of New Mexico, incorrectly combined the two elements of the qualified immunity inquiry into a singular "clearly established" probe, using the "strict factual correspondence" rule, discussed *infra*.

"[Qualified immunity] requires . . . [the court] to undertake 'an inquiry into the general legal principles governing analogous factual situations, if any, *and a subsequent determination* whether the official should have related this established law to the instant situation' [citations omitted]." (Emph. Supp.) *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 726 (3rd Cir. 1989) (*"Stoneking II"*). *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987). In *Stoneking II*, 882 F.2d at 726, the constitutional right, the first

aspect of the qualified immunity inquiry, was the general constitutional protection of "freedom from invasion of . . . personal security." The second part of the *Harlow* inquiry in *Stoneking II* involved the more fact-specific legal analysis of whether or not the facts of the "establishing cases" were sufficiently analogous to the presenting facts so as to give the state actor cause to hesitate in the commission of a potential constitutional tort.

Is the state official's "objectively reasonable knowledge" of the law and application to the facts imputed via "a reasonably competent legal advisor" (*Garcia By Garcia*, 817 F.2d at 658)?

The second part of the qualified immunity inquiry, application of the legal right, may be accomplished in one of three divergent ways, depending upon the circuit in which the case originates: (i) strict factual correspondence between the constitutional right "establishing case" and the instant case, (ii) application of the general legal principle to an analogous fact pattern, or (iii) requirement that public officials anticipate legal developments. *See* Comment, *Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983*, 132 U. Pa. L.Rev. 901, 923-32 (1984), and cases cited therein. This Court has not yet settled the question of which of these various approaches should be taken. What may be an enforceable constitutional right varies depending upon the circuit, *i.e.*, qualified immunity may or may not shield a Section 1983 constitutional tort claim, depending upon which approach the circuit takes.

Neither has this Court decided the related questions of whether or not a split of authorities from different

circuits gives rise to qualified immunity, or if a split of authority within one jurisdiction clearly establishes an unclear state of the law in that circuit, whether knowledge of "unpublished" or unreported decisions may be imputed to public officials, and, as already questioned, whether the official's "objective knowledge of the law" is to be imputed to the state actor via his/her "reasonably competent" legal advisor.

In *Maldonado,* the general legal right not to be deprived of *life* without due process of law, by "deliberate indifference" or "recklessness" of a state official who has functional custody of the individual, was "clearly established" by March 16, 1987, *see Bell v. City of Milwaukee,* 746 F.2d 2305 (7th Cir. 1984). The federal common law Section 1983 deprivation of life claim was presented to the Court of Appeals for the Tenth Circuit in *Maldonado,* APPENDIX, E1-E2, however the court did not address this branch of the substantive due process claim in its opinion.

Regarding the *liberty* interest claim, the first part of the qualified immunity inquiry should also have been successfully surmounted in *Maldonado,* referencing the constitutional right "establishing cases" which were in effect in 1987: "there is a constitutionally protected liberty interest in reasonable care and safety of one . . . under the control of state actors," *Youngberg,* 457 U.S. at 317-19; "students do not shed their constitution rights at the school house gate," *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969); bodily integrity of public school students implicates a constitutionally protected liberty interest, *Ingraham v. Wright,* 430 U.S. at 672; "the constitutional rights of children to be

free from harm is commensurate with the rights of adults . . . given the helplessness and blamelessness of the victims," *Doe "A"*, 637 F.Supp. at 1145.

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## CONCLUSION

For the above stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 10, 1992

## APPENDIX A

*Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992)

**Leroy MALDONADO, Personal Representative of the Estate of Mark P. Maldonado, Deceased, Plaintiff-Appellant,**

**v.**

**Anne JOSEY, Personal Representative of the Estate of Margaret Berry, Deceased; Butch McGowen; Paul Malano, in their individual capacities only, Defendants-Appellees.**

**No. 91-2176.**
United States Court of Appeals,
Tenth Circuit.

Sept. 16, 1992.

Parent brought action for wrongful death of child, arising from child's accidental death in school cloakroom adjacent to his grade school classroom. Complaint asserted that death of child from strangulation after he was caught on bandana in cloakroom occurred as direct result of teacher's failure to supervise her students. The United States District Court for the District of New Mexico, John E. Conway, J., entered summary judgment in favor of teacher, principal, and superintendent, and plaintiff appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) state compulsory school attendance law did not give rise under the due process clause to affirmative duty to protect school children who attend state-run schools from constitutional deprivations by private actors, and (2) teacher was entitled to qualified immunity, as plaintiff failed to establish a constitutional deprivation with regard to teacher's liability.

Affirmed.

Seymour, Circuit Judge, filed concurring opinion.

Stephen E. Tinkler (John B. Roesler, Of Counsel to Roth, VanAmberg, Gross, Rogers & Ortiz, Santa Fe, N.M., and Ernesto J. Romero, of The Romero Law Firm, Albuquerque, N.M., with him on the briefs), Santa Fe, N.M., for plaintiff-appellant.

Kevin M. Brown (Stephen M. Williams, of Miller, Stratvert, Torgerson & Schlenker, P.A., with him on the brief), Albuquerque, N.M., for defendants-appellees.

Before SEYMOUR and TACHA, Circuit Judges, and BENSON, District Judge.*

TACHA, Circuit Judge.

Appellant LeRoy Maldonado appeals an order of the district court granting summary judgment in favor of appellees. On appeal, Maldonado contends that the district court erred in granting summary judgment in favor of appellees on the basis of qualified immunity. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm on different grounds.

## BACKGROUND

On March 16, 1987, Mark Maldonado, while attending Kearney Elementary School in Raton, New Mexico, became caught on his bandana in a cloakroom adjacent to

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* The Honorable Dee V. Benson, District Judge for the United States District Court for the District of Utah, sitting by designation.

his classroom and died of strangulation. Mark Maldonado was eleven years old and in the fifth grade when he died. According to the complaint, Mark Maldonado was unsupervised in the adjacent cloakroom for approximately twenty minutes. During this period, his teacher, Margaret Berry, was conducting class in the classroom and was responsible for a class of fifth grade students, including Mark Maldonado. The record does not disclose the reason for Mark Maldonado's absence from the classroom.

On August 7, 1990, LeRoy Maldonado filed an action for monetary damages under 42 U.S.C. § 1983 in the United States District Court for the District of New Mexico for the wrongful death of Mark Maldonado. The complaint asserted that the death of Mark Maldonado occurred as a direct result of Margaret Berry's failure to supervise her students and principal Paul Malano's and superintendent Butch McGowen's deliberate indifference to training and supervision requirements.

The district court granted summary judgment as to all defendants on July 8, 1991. With regard to defendants Malano and McGowen, the district court found that the plaintiff did not show "that the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the school administrators can reasonably be said to have been deliberately indifferent." With regard to the teacher, the district court concluded that "[o]n March 16, 1987, the law was not clearly established as to a teacher's duty to observe every student in class for the time the students are in class." This appeal followed.

## DISCUSSION

We review summary judgment orders de novo, using the same standards the district court applies. *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir.1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

On appeal, Maldonado challenges only the district court's judgment with regard to the teacher's liability.[1] Maldonado argues that the district court erred in granting summary judgment in favor of the appellee on the basis of qualified immunity. He asserts that qualified immunity was improper because the law was clearly established on March 16, 1987. The district court concluded that it could not "find the law well established as to the supervisory duty of a teacher in a classroom." Maldonado contends that a Fourteenth Amendment liberty interest and a Fourteenth Amendment protection from deprivation of life without due process of law were implicated by the failure to provide reasonable care and safety for public grade school children and by reckless

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[1] Appellant's brief states: "This appeal pertains only to the defendant-appellee classroom teacher's liability."

indifference to supervision requirements in a public grade school.

As a threshold inquiry to qualified immunity, we first must determine whether Maldonado's allegations, even if accepted as true, state a claim for violation of any rights secured under the United States Constitution. *See Siegert v. Gilley*, ___ U.S. ___, ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." Pursuant to 42 U.S.C. § 1983, Maldonado's claim invokes the substantive component of the Due Process Clause in that he asserts that, under the circumstances, the state was under a categorical obligation to protect Mark Maldonado. The Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), guides our determination of whether this categorical obligation arose.

In *DeShaney*, the Supreme Court held that the Due Process Clause did not impose a duty on a state to protect the life, liberty, and property of citizens from deprivations by private actors absent the "State's affirmative act of restraining the individual's freedom to act in his own behalf." *Id.* at 200, 109 S.Ct. at 1006. In that case, a state agency repeatedly received reports of the abuse of Joshua DeShaney by his father and, even after receiving these reports, did not remove the child from his father's custody. Eventually, the child suffered permanent brain damage as a result of his father's repeated beatings. The child and his mother brought an action under 42 U.S.C. § 1983 against the state officials alleging that the state agency's

inaction deprived Joshua DeShaney of his liberty in violation of the Due Process Clause.

The Supreme Court began its analysis by noting that the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law.' " *Id.* at 195, 109 S.Ct. at 1003. However, the Court stated that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* The Court found that only "in certain limited circumstances [does] the Constitution impose[] upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198, 109 S.Ct. at 1004-05.

The Court recognized that this affirmative duty has been found to exist in only a few, limited situations. The state must provide adequate medical care to prisoners, *see Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); the state must provide involuntarily committed mental patients with services that are necessary to ensure their reasonable safety from themselves and others, *see Youngberg v. Romeo*, 457 U.S. 307, 314-25, 102 S.Ct. 2452, 2457-58, 78 L.Ed.2d 28 (1982); and suspects in police custody who have been injured while being apprehended by the police must be given medical care by the state, *see City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983). The Court explicitly left open the possibility that this affirmative duty to protect could arise if "the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents." *DeShaney*, 489 U.S. at 201 n. 9, 109 S.Ct. at

1006 n. 9. The Court indicated that such "a situation [might be] sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id.* Since *DeShaney*, we have held that a child in the state's legal and physical custody who is placed in a private foster care facility is in a sufficiently analogous position to fall within this limited class of situations where an affirmative duty does exist. *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883 (10th Cir.1992).[2]

In declining to find an affirmative duty in *DeShaney*, the Court noted that the incarceration and institutionalization cases only demonstrate "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* 489 U.S. at 199-200, 109 S.Ct. at 1005. Most importantly, explaining the rationale behind this principle, the Court stated that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and

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[2] Three other circuits have reached the same conclusion. *See K.H. ex rel. Murphy v. Morgan*. 914 F.2d 846 (7th Cir.1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir.1987) (en banc), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981).

the Due process Clause." *Id.* at 200, 109 S.Ct. at 1005-06. The Court concluded that

> [i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

*Id.* at 200, 109 S.Ct. at 1006 (footnote omitted). Thus, in light of *DeShaney*, we must decide on this appeal whether New Mexico State compulsory attendance laws[3] so restrain a school child's personal liberty that the Due Process Clause imposes upon the state an affirmative obligation to protect that child.

We emphasize that Mark Maldonado's situation does not fall within the cases holding that extreme corporal punishment, or sexual abuse and harassment by a school teacher or counselor, can violate the substantive due process rights of school children. In *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 1414, 51 L.Ed.2d 711 (1977), the Supreme Court held that "where school authorities, acting under color of state law, deliberately decide[] to punish a child for misconduct by restraining the child and inflicting appreciable physical pain," Fourteenth

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[3] The New Mexico Constitution, art. XII, § 6 provides that "[e]very child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such a period and for such time as may be prescribed by law." *See also* N.M.Stat.Ann. §§ 22-12-1 to 22-12-7 (Michie 1978).

Amendment liberty interests are implicated. In *Garcia v. Miera*, 817 F.2d 650, 654 (10th Cir.1987), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988), we held that *Ingraham* "clearly signaled that, at some degree of excessiveness or cruelty, the meting out [of] such punishment violates the substantive due process rights of the pupil." Similarly, the Third Circuit has held that school authorities could be found liable for establishing and maintaining a policy, practice, or custom with deliberate indifference to the consequences when a student was sexually abused by her teacher. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir.1989) (en banc), *cert. denied*, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990) (*Stoneking II*). The court expressly distinguished *DeShaney* and stated that "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725.

In the corporal punishment and sexual abuse contexts, a state actor directly inflicts the harm on the student and thereby implicates the Due Process Clause which itself imposes limitations on state conduct. In contrast, this case does not directly implicate these substantive due process concerns because regardless of whether the school teacher could have prevented the harm, she did not directly inflict Mark Maldonado's injury. Thus, this case bears a closer resemblance to *DeShaney*, where the harm was inflicted by a private actor, than to *Garcia*, where a state actor inflicted the injury on a student. The resemblance between this case and *DeShaney* explains why our discussion of the relationship between the state and public school students in *Hilliard v. City and County of*

*Denver*, 930 F.2d 1516 (10th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 656, 116 L.Ed.2d 748 (1991), is inapposite.

In *Hilliard*, the police arrested the driver of an automobile and left the female passenger stranded in the automobile. The police left the passenger without keys to the automobile due to her intoxicated state; a third person subsequently robbed and sexually assaulted her. We reviewed *Ingraham* and concluded that "it was not clearly established in 1988 that someone whose person was not under some degree of physical control by the state or who was not involved in a fourth amendment search or seizure would have a clearly established, constitutionally protected liberty interest." *Id.* at 1520.

In reaching this conclusion, we briefly discussed the relationship between school children and the state. We stated that

> [p]ublic school students, although not restricted to the same degree as arrestees, convicts and patients involuntarily committed to state mental hospitals, are similarly involved in an environment where the state has some lawful control over their liberty. Students are required by state law to attend school and thus are prevented by the state from voluntarily withdrawing from situations posing the risk of personal injury.

*Id.* Read in context, our discussion in *Hilliard* suggests only that a party pursuing a substantive due process claim under *Ingraham* must allege that she was subject to at least the same degree of restraint that the state imposed upon public school children. As we have already noted, however, the present case does not implicate the concerns that were addressed in either *Ingraham* or this

court's decision in *Garcia* – namely, affirmative acts of excessive or cruel punishment. Therefore, our discussion in *Hilliard* about the relationship between the state and public school students has little bearing on the question that we must decide here.

This case presents us squarely with an issue that we did not address in *Hilliard* – that is, whether a compulsory state attendance law sufficiently restrains a school child's liberty so that the state incurs, under the Due Process Clause, an affirmative duty to protect school children who attend state-run schools from deprivations by private actors. We hold that compulsory attendance laws in no way restrain a child's liberty so as to render the child and his parents unable to care for the child's basic needs. Thus, no affirmative duty arises merely on the basis of compulsory attendance laws.

This Third Circuit faced this precise issue in *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir.1992) (en banc). In *Middle Bucks*, public high school students sued Pennsylvania school authorities under 42 U.S.C. § 1983 for harm suffered when they were physically, verbally, and sexually molested by several male students. The recurring assaults occurred throughout the 1989-90 school year while the students attended a graphic arts class. The plaintiffs argued that a special relationship existed between students and the school authorities during the school day because the State's compulsory education laws so restrained the children's liberty interests that they should be deemed to be in the State's custody during school hours for purposes of the Fourteenth Amendment. That special relationship, they argued, gave rise to an affirmative constitutional duty on

the part of state officials to protect students from serious harm. The court held that no special relationship based upon a restraint of liberty existed, stating that "[b]y requiring D.R. to attend assigned classes at Middle Bucks as part of her high school educational program, and authorizing officials to engage in disciplinary control over the students, the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs." *Id.* at 1372.

The court distinguished the incarceration and institutionalization cases from those involving school students because the former involve "full time severe and continuous state restriction[s] of liberty" and render the institutionalized "wholly dependant upon the state . . . to meet their basic needs." *Id.* at 1371. In contrast, parents decide where their children will be educated, and public school children "remain resident in their homes [and] may turn to persons unrelated to the state for help on a daily basis." *Id.* at 1372. The court also contrasted the school student context with the foster care cases:

> A relationship between the state and foster children arises out of the state's affirmative act in finding the children and placing them with state-approved families. By so doing, the state assumes an important continuing, if not immediate, responsibility for the child's well-being. In addition, the child's placement renders him or her dependent upon the state, through the foster family, to meet the child's basic needs. Students, on the other hand, do not depend upon the schools to provide for their basic human needs.

*Id.* (citations omitted).

The Seventh Circuit reached the same conclusion in *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir.1990). In *Alton*, parents of various students brought an action against Illinois school authorities under § 1983 for violation of their children's liberty interest as a result of the alleged sexual molestation of their children by a school teacher.[4] The plaintiffs argued that "the school defendants had a 'special relationship' to the school children, imposing an affirmative duty to provide for their safety and to prevent the child abuse that occurred in this case." *Id.* at 272. The Seventh Circuit concluded that "the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises." *Id.* The Seventh Circuit based this conclusion on the fact that school children, unlike prisoners and mental patients, are able to provide for their basic human needs and that "parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child." *Id.*

After reviewing *DeShaney*, *Middle Bucks*, and *Alton*, we agree with the Third and Seventh Circuits and conclude that compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend

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[4] Despite the fact that the school teacher is a state actor, the court distinguished *Stoneking II* because the plaintiffs argued that the authorities were liable only because of their special relationship with the students, not because they established or maintained policies allowing the action to occur. *Id.* at 271-72.

school.[5] Under *DeShaney*, an affirmative duty to protect arises only when the state "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs." *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1005. This type of restraint simply does not occur under New Mexico compulsory attendance laws. Although a child may well be in the "custody" of the school authorities during school hours, this custody does not amount to a restraint that prohibits the child and his parents from caring for the basic needs of the child. Compulsory attendance laws do not alter the fact that parents retain ultimate responsibility for their child's food, shelter, clothing, medical care, and reasonable safety.

Further, the state does not confine school children in the same way that it confines prisoners, the institutionalized, or children in foster homes. These individuals depend completely on the state to satisfy their basic human needs; the state restrains their liberty to such an extent that it renders them unable to care for their own basic needs. School children, on the other hand, can leave school at the end of the day. The compulsory education

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[5] Two recent district court opinions, relying on *Alton*, reached the same conclusion. *See Dorothy J. v. Little Rock, Sch. Dist.*, 794 F.Supp. 1405 (E.D.Ark.1992) (holding that state laws regarding compulsory education and in loco parentis authority do not give rise to special relationship between school district and student sexually assaulted by another student); *Doe v. Douglas County Sch. Dist. RE-1*, 770 F.Supp. 591 (D.Colo.1991) (concluding that special relationship did not exist between county school district and student where school psychologist sexually molested student). *But see Waechter v. School Dist. No. 14-030*, 773 F.Supp. 1005 (W.D.Mich.1991).

laws do not change the fact that the parents are the primary caretakers of the students; those same parents – and not the state – must determine and address the basic needs that each child has. This amount of freedom on the part of the student and the degree of parental involvement and control necessarily dictate that the state does not become the primary caretaker simply by mandating compulsory school attendance.

Thus, we conclude that compulsory attendance laws do not impose the severe restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment. Although the facts of this case present a truly tragic situation, the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202, 109 S.Ct. at 1007.

Because appellant does not appeal the district court's grant of summary judgment in favor of defendants McGowen and Malano, we do not address whether Maldonado stated an independent basis for liability that is not controlled by *DeShaney*. *See Stoneking II*, 882 F.2d at 725 ("Liability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."). We simply conclude that Maldonado has failed to establish a constitutional deprivation with regard to the school teacher's liability. Therefore, appellee is entitled to qualified immunity.

AFFIRMED.

SEYMOUR, Circuit Judge, concurring.

No sooner does this circuit determine that the state owes children in its custody an affirmative duty of protection, *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir.1992), than the majority here limits that duty to exclude schoolchildren. While I concur in the result reached by the majority opinion, I depart from its analysis at a critical point. Rather than conclude flatly that no affirmative duty exists in this situation, I would follow the analysis set out in *Yvonne L.*, 959 F.2d at 890-93, and hold that a child legally required to attend school and thereby forced into the temporary day-time custody of the state's agents is constitutionally entitled to some level of protection from harm and care for basic safety. I would nonetheless affirm summary judgment in defendant's favor because there is no evidence in the record that the teacher was deliberately indifferent to the danger that awaited Mark Maldonado, and thus no issue of material fact with respect to defendant's *breach* of a clear affirmative duty.

*DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), as the majority recognizes, interprets past Supreme Court precedent as holding that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200, 109 S.Ct. at 1005. The idea is simply that the state assumes an obligation to fulfill the "basic human needs – *e.g.*, food, clothing, shelter, medical care, and *reasonable safety*," *id.* at 200, 109 S.Ct. at 1005 (emphasis added), of those people whom the state has rendered unable to care for themselves.

In *Yvonne L.*, we followed a number of other courts in concluding that state foster care is a situation in which the state, by shouldering the responsibility to care for children, incurs an affirmative constitutional duty to insure their reasonable safety. We held that an affirmative duty to foster children follows from the line of cases imposing such a duty on the state with respect to pretrial detainees, *see City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (duty to provide medical care), mentally disabled people in state institutions, *see Youngberry v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (duty to insure reasonable safety), and prisoners, *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (duty to provide medical care). We also analogized the situation of children in state foster care to that of juveniles involuntarily placed by the state in a private boarding school, *see Milonas v. Williams*, 691 F.2d 931 (10th Cir.1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.Ed.2d 947 (1983). On the basis of this line of cases and the above-quoted language from *DeShaney*, we concluded that "[i]f defendants knew of the asserted danger to plaintiffs or failed to exercise professional judgment with respect thereto, . . . and if an affirmative link to the injuries plaintiffs suffered can be shown, then . . . defendants violated plaintiffs' constitutional rights." *Yvonne L.*, 959 F.2d at 890.

The majority attempts to distinguish the custodial situations described in *DeShaney* and *Yvonne L.* from the facts presented here by observing that compulsory attendance laws do not "render the child and his parents unable to care for the child's basic needs." Maj. op. at 731. To reach this conclusion, the majority focuses on two

circuit court decisions. In *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir.1990), the Seventh Circuit concluded that a school district is not constitutionally liable for the sexual molestation of students by their teacher because compulsory attendance laws do not create "responsibility for [the students'] entire personal lives."[1] *Id.* at 272. Following a similar rationale, the Third Circuit held that compulsory attendance laws do not create an affirmative duty to protect *high school* students from repeated sexual assaults by other students because children in school are still able to meet their own "basic needs." *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir.1992) (en banc). Both courts read *DeShaney* as finding an affirmative duty to protect only when the state has physical custody of the individual. Under this analysis, school children, as residents in their parents' homes, are not in custody of the state. Therefore, parents retain responsibility for providing for the children's basic needs, including protection during school hours. The Third Circuit further stated that, to provide this protection, parents may remove their children from public school in favor of home education or private

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[1] The suggestion in *Alton* that sexual assault is a matter of one's "personal life" is as offensive as it is bizarre. No one, to my knowledge, has contended that a school district is to be held constitutionally responsible for *all harm* that may befall a student, no matter when or where. A school or teacher may nonetheless assume an obligation to protect its students during those hours that a student is on school premises or in a classroom as required by state law.

schools. The Third Circuit also found no custodial relationship stemming from a restraint of the student's liberty since the student "could, and did, leave the school building every day. The state . . . thus did not deny her meaningful access to sources of help." *Id.* at 1372.

Much of the *Middle Bucks* analysis does not support the majority's opinion here. Unlike the repeated incidents in *Middle Bucks* and *Alton*, a sole incident is the basis of Mark Maldonado's death. No warnings or previous injuries existed to alert Mark's parents or to allow Mark to "seek help." Moreover, even if such warnings had existed, the belief that alternatives to public education are easily found is misplaced. "For the vast majority of children of school age, [there] is no choice at all." *Middle Bucks*, 972 F.2d at 1380 (Sloviter, C.J., dissenting).

Beyond the stark differences in facts, the basis of the holdings in *Alton* and *Middle Bucks* is off the mark. Obviously, a parent does not lose all control over, nor all responsibility for, satisfying a child's basic needs simply as a result of school attendance laws. But younger children are incapable of providing for their own basic needs; they depend on parents or other caretakers to provide for them.[2] Even older children may be forced by school disciplinary procedures and rules to rely on authority figures at school to protect them from harm. I cannot fathom

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[2] Even the Third Circuit recognized the difference between younger and older school children. In discussing whether high school children are in some sort of custody of the school during school hours, the court in *Middle Bucks* stated: " *'[e]xcept perhaps when very young,* the child is not physically restrained from leaving school during school hours.' " *Id.* at 1372 (quoting *Ingraham v. Wright*, 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed.2d 711 (1977) (emphasis added).

who, other than a teacher or other school staff member, is capable of ensuring the "reasonable safety" of schoolchildren during the school day and class periods.

A number of district court cases are at odds with the holdings of *Alton* and *Middle Bucks*, followed by the majority here, that public school personnel owe no constitutional duty to children in their care. In *Pagano v. Massapequa Pub. Schs.*, 714 F.Supp. 641, 643 (E.D.N.Y.1989), for example, the court held "elementary school students who are required to attend school . . . to be owed *some* duty of care by [school] defendants." *Id.* at 643. Similarly, a district court more recently held that a student "was in a custodial relationship" with his teacher, who required the student to run a 350 yard sprint despite his knowledge of the student's congenital heart defect. *Waechter v. School Dist. No. 14-030*, 773 F.Supp. 1005, 1009 (W.D.Mich.1991).[3] *But see Dorothy J. v. Little Rock Sch. Dist.*, 794 F.Supp. 1405 (E.D.Ark.1992) (following *Alton*).

Although I believe the state owes a constitutional duty to provide for the reasonable safety to children required to attend school. I would nevertheless affirm the dismissal of the complaint in this case. Because the complaint does not allege that the teacher was deliberately indifferent to the potential danger to Mark Maldonado, it fails to state a breach of the teacher's duty. *See* Appellant's Appendix at 1-6. I do not believe the Constitution

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[3] Because the teacher was the direct cause of harm in *Waechter*, that case could presumably have also been brought under the line of cases following *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). *See, e.g., Garcia v. Miera*, 817 F.2d 650 (10th Cir.1987) *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988).

requires an elementary school teacher to protect her students from unknown and unforeseen harms, or to follow the minute-by-minute progress of her eleven-year-old charges. Even accepting as true the allegations that the teacher "permitt[ed] him to leave the classroom and remain in the cloakroom unsupervised for [twenty minutes]," *id.* at 3, there is nothing that suggests either the teacher's "deliberate indifference" or "failure to exercise professional judgment," *see Yvonne L.*, 959 F.2d at 893-94. Under the facts as alleged, the teacher did not breach the duty I believe the Constitution imposes.

The ground on which I concur, however, is a far cry from the majority's holding that no constitutional duty exists in any case. Under the majority's holding, children suffering all manner of injuries attributable to the knowing inaction of state officials charged with their supervision and care will be unable to pursue federal constitutional claims. We do not adequately discharge our duty to interpret the Constitution by merely describing the facts as "tragic" and invoking state tort law, *see* maj. op. at 732.[4] In my judgment, the Fourteenth Amendment requires that we recognize *some* affirmative duty on the part of public school teachers to protect students who are in the total care of the school during the period of their compulsory attendance.

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[4] Such an abdication is particularly disingenuous when, as here, the teacher or other state actor is insulated from state liability under a state tort claims act, *see* N.M.Stat.Ann. § 41-4-4 (1989).

## APPENDIX B

Tenth Circuit Court of Appeals Judgment in *Maldonado v. Josey*

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| | | |
|---|---|---|
| LEROY MALDONADO, Personal Representative of the Estate of MARK P. MALDONADO, Deceased, | ) | |
| Plaintiff – Appellant, | ) | No. 91-2176 (D.C. No. CIV-90-267-JC) |
| v. | ) | |
| ANNE JOSEY, Personal Representative of the Estate of MARGARET BERRY, Deceased; BUTCH MOGOWEN, PAUL MALANO, in their individual capacities only, | ) | |
| Defendants – Appellees. | ) | |

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JUDGMENT
Entered September 16, 1992

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Before SEYMOUR and TACHA, Circuit Judges, and BENSON*, District Judge.

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*The Honorable Dee V. Benson, District Judge for the United States District Court ofr [sic] the District of Utah, sitting by designation.

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This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

A true copy

Teste

Robert L. Hoecker
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

/s/ Illegible
Deputy Clerk

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

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## APPENDIX C

U.S. District Court, District of New Mexico, Summary Judgment Opinion and order

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

LeROY MALDONADO, Personal Representative of the Estate of Mark P. Maldonado, Deceased,

Plaintiff,

vs.

ANNE JOSEY, Personal Representative of the Estate of Margaret Berry, Deceased; BUTCH McGOWEN and PAUL MALANO, in their individual capacities only,

Defendants.

NO. CIV 90-0267 JC

FILED
UNITED STATES
DISTRICT
COURT
JUL 8 1991

### SUMMARY JUDGMENT

THIS MATTER having come before the Court upon the Motion for Summary Judgment filed by all Defendants on the issue of qualified immunity. On June 26, 1991, a hearing was held on the motions. The Plaintiff, LeRoy Maldonado, personal representative of the Estate of Mark P. Maldonado, was represented by counsel of record, Defendant, Anne Josey, personal representative of the estate of Margaret Berry, appeared in person and was represented by counsel of record and Defendants Butch McGowen and Paul Malano were represented by counsel of record. The Court, after reviewing the pleadings filed herein, hearing argument of counsel and being otherwise

fully advised in the premise, finds that the motions for summary judgment as to all Defendants are well taken.

In support of this ruling, the Court states the following:

1. There has been no showing by the Plaintiff that the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the school administrators can reasonably be said to have been deliberately indifferent. *Stoneking v. Bradford Area School District,* 882 F.2d 720, 725 (34d Cir. 1989) *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). There is no viable substantive due process claim against Malano and McGowen based upon supervisory liability theories.

2. On March 16, 1987, the law was not clearly established as to a teacher's duty to observe every student in class for the time the students are in class. The law is still not clearly established that there is a duty to protect children who are compelled by state law to attend school who are physically mistreated by school district employees. *Stoneking v. Bradford Area School District,* 882 F.2d 720, 724 (3rd Cir. 1989). There has been no showing of any cases addressing the failure to supervise students in a classroom. The Court in *Stoneking* could not find the law well established as to the sexual abuse of children in school. Therefore this Court cannot find the law well established as to the supervisory duty of a teacher in a classroom. At the time of Mark Maldonado's death, the law was not clearly established that grossly negligent, reckless or grossly reckless failure to supervise a public school student may give rise to a Section 1983 Fourteenth Amendment substantive due process violation. Margaret Berry, deceased, is therefore entitled to qualified immunity. This decision as to defendant Ann Josey, Personal

Representative of the Estate of Margaret Berry, Deceased, is based upon the defense of qualified immunity.

IT IS THEREFORE ORDERED that Defendants' motion for summary judgment is hereby granted. Plaintiff's Complaint is dismissed with prejudice as to all defendants.

/s/ John E. Conway
DISTRICT COURT JUDGE

SUBMITTED BY:

BEALL, PELTON, O'BRIEN & BROWN

By: /s/ Kevin M. Brown
KEVIN M. BROWN
Attorney for Defendants

APPROVED BY:

By: /s/ John B. Roesler
JOHN B. ROESLER
Attorney for Plaintiff

By: /s/ Ernesto J. Romero by John Roesler
ERNESTO J. ROMERO
Attorney for Plaintiff

By: /s/ Stephen Tinkler by John Roesler
STEPHEN E. TINKLER
Attorney for Plaintiff

APPROVED :

By: /s/ Illegible
STEPHEN M. WILLIAMS
Attorney for Defendant
Anne Josey

## APPENDIX D

**Application No. A-423 for extension of time to file petition for a writ of certiorari, filed November 30, 1992, and Order by Justice Byron R. White, filed November 30, 1992, granting extension to and including December 24, 1992.**

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November 25, 1992

**VIA FEDERAL EXPRESS**

William K. Suter
Clerk of the Court
United States Supreme Court
One First Street NE
Washington, D.C. 20543

**Re: Rule 13.2 Request for Extension of Time to File Petition for A writ of Certiorari**

Dear Mr. Suter:

I respectfully request a one week extension of time from December 16, 1992, to and including December 24, 1992,

within which to file petition for writ of certiorari to review the Tenth Circuit Court of Appeals decision in *Maldonado v. Josey*, No. 91-2176, 1992 W.L. 221991, ___ F.2d ___ (10th Cir. Sept. 16, 1992), copy of slip. op. attached.

Good cause exists to grant this extension. I am faced with a December 21, 1992 completion deadline on a public school law treatise under contract with *Am Jur Trials*.

I would appreciate the Court's indulgence in considering the *Maldonado* petition along with two other current petitions presenting the same issue of law, *i.e.*, whether the Court should extend *DeShaney* "custodial duty" protection to public schools. *See D.R. v. Middle Bucks Area Vocational Technical School*, No's. 91-1136 & 91-1137, 1992 W.L. 19115, ___ F.2d ___ (3rd Cir. August 11, 1992) (*cert. pending*, Sup. Ct. Docket No. 92-816), and *Doe v. Taylor Independent School Dist.*, No. 90-8431, 1992 W.L. 247175, ___ F.2d ___ (5th Cir. Oct. 2, 1992) (*cert. pending* as of Friday, November 27, 1992).

Thank you for your consideration of this matter.

Sincerely,

/s/ John Roesler
JOHN B. ROESLER
JBR:clg

Enclosure

cc: Messrs. Stephen E. Tinkler, Ernesto J. Romero, Stephen M. Williams and Kevin M. Brown; Mr. & Mrs. LeRoy Maldonado

D3

**Supreme Court of the United States**

*No.*

A-423

Leroy Maldonado,

Petitioner

v.

Anne Josey, et al.

---

ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

December 24, 1992.

/s/ Byron R. White
Associate Justice
of the Supreme
Court of the United States

Dated this 30th

day of November, 1992.

## APPENDIX E

**Excerpts from Tenth Circuit Brief of Appellant regarding Section 1983/Wrongful Death deprivation of life without due process of law claim, and the Statement of the Issue and Statement of the Case as pertain to the deprivation of life claim.**

* * *

### STATEMENT OF THE ISSUE

Was the law "clearly established" on March 16, 1987, so as to satisfy the first "purely legal" step of the two-part *Harlow v. Fitzgerald* test, that the Fourteenth Amendment liberty interest and protection from deprivation of life without due process of law were implicated, respectively, by a public school teacher's failure to provide "reasonable care and safety" during class for grade school children, and by "reckless indifference" to supervision requirements at a public grade school, causing death of a pupil?

### STATEMENT OF THE CASE

Summary Judgment as to all defendants was granted by the District Court on July 8, 1991, on the basis of qualified immunity (Aplt's Append. pp. 118-120), and Notice of Appeal was filed on August 7, 1991 (Aplt's Append. pp. 121-122). This appeal pertains only to the defendant-appellee classroom teacher's liability, and the first purely legal inquiry of the two-part *Harlow v. Fitzgerald, infra,* test, namely whether the liberty interest

and protection from deprivation of life without due process were clearly established and implicated in this case on March 16, 1987, the date of alleged wrongful death.

As stated and alleged in plaintiff-appellant's "First Amended Complaint To Recover Damages For Wrongful Death, Violation of Civil Rights," filed on August 7, 1990 (Aplt's Append. pp. 1-7), this is an action for monetary damages by decedent's estate under Title 42 U.S.C. Section 1983 for the wrongful death of fifth grade student Mark P. Maldonado at Kearney Elementary School, a public elementary

* * *

Moreover, a separate *Federal common law "Section 1983/Wrongful Death"* claim for *"deprivation of life without due process of law"* has been stated! The threshold here for stating a claim or recovery is **"reckless indifference."** *See Bell v. City of Milwaukee,* 746 F.2d 2305 (7th Cir. 1984), decided three years prior to the wrongful death in this case. (*Berry v. City of Muskogee,* 900 F.2d 1489 (10th Cir. 1990), recently modified the damages element of the claim, however the Constitutional right to be free from "reckless indifference" while one is under the care, custody, supervision or control of the State remains the same. The basic legal right not to be deprived of life without due process of law while in the care and control of the State was clearly established and implicated on March 16, 1987. ***But for* the classroom teacher's "reckless indifference" to supervision of this child, who was entrusted to her supervision and control, Mark Maldonado would not have died on March 16, 1987.**

* * *

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# APPENDIX F

**New Mexico Compulsory School Attendance Law, Section 22-12-2 1978 N.M.S.A., as amended.**

**22-12-2. Compulsory school attendance; responsibility.**

A. Any qualified student and any person who because of his age is eligible to become a qualified student as defined by the Public School Finance Act [22-8-1 to 22-8-42 NMSA 1978] until attaining the age of majority shall attend a public school, a private school, a home school or a state institution. A person shall be excused from this requirement if:

(1) the person is specifically exempted by law from the provisions of this section;

(2) the person has graduated from a high school;

(3) the person is at least sixteen years of age and has been excused by the local school board or its authorized representative upon a finding that the person will be employed in a gainful trade or occupation or engaged in an alternative form of education sufficient for the person's educational needs and the parent, guardian or other person having custody and control consents;

(4) with consent of the parent, guardian or person having custody and control of the person to be excused, the person is excused from the provisions of this section by the superintendent of schools of the school district in which the person is a resident and the person is under eight years of age; or

(5) the person is judged, based on standards and procedures adopted by the state board, to be unable to benefit from instruction because of learning disabilities or mental, physical or emotional conditions.

B. A person subject to the provisions of the Compulsory School Attendance Law [22-12-1 to 22-12-7 NMSA 1978] shall attend school for at least the length of time of the school year that is established in the school district in which the person is a resident.

C. Any parent, guardian or person having custody and control of a person subject to the provisions of the Compulsory School Attendance Law is responsible for the school attendance of that person.